**Case C-65/20**

**Request for a preliminary ruling**

**Date lodged:**

7 February 2020

**Referring court:**

Oberster Gerichtshof (Austria)

**Date of the decision to refer:**

21 January 2020

**Applicant:**

VI

**Defendant:**

KRONE — Verlag Gesellschaft mbH & Co KG

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In its jurisdiction to hear appeals on points of law … in the case brought by the applicant VI … against KRONE — Verlag Gesellschaft mbH &Co KG, Vienna …, … for EUR 6 338.84 … and a declaration, the Oberster Gerichtshof (Supreme Court), with regard to the appeal on a point of law lodged by the applicant against the judgment of the Handelsgericht Wien (Commercial Court, Vienna) of 18 April 2019 given in its appellate jurisdiction, …, by which the judgment of the Bezirksgericht für Handelssachen Wien (District Court for Commercial Matters, Vienna) of 31 July 2018 … was upheld, makes the following

Order

I. The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU: **[Or. 2]**

Is Article 2 together with Article 1 and Article 6 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative

provisions of the Member States concerning liability for defective products to be interpreted as meaning that a physical copy of a daily newspaper containing a technically inaccurate health tip which, when followed, causes damage to health can also be regarded as a (defective) product?

II. [OMISSIS] [staying of proceedings]

*GROUNDS:*

**1. Facts:**

The defendant is a media proprietor and (according to its own claims) the publisher of a regional edition of the 'Kronen-Zeitung' newspaper. According to the statutory definition contained in Paragraph 1(1)(8)(b) of the Mediengesetz (Law on the media), BGBl No 314/1981, in the version in BGBl I No 49/2005, the term 'media proprietor' covers, inter alia, a person who manages the content of a media work and either manages or arranges for the production and circulation of that work.

On 31 December 2016, in the "Austria" section, appearing with a border around it and under the heading 'Hing'schaut und g'sund g'lebt' (Taking a Look and Healthy Living), the defendant published an article by 'Kräuterpfarrer Benedikt' (Herbalist Priest Benedikt) entitled 'Schmerzfrei ausklingen lassen — Eine Auflage aus geriebenem Kren' (Achieving pain-free relief — apply a layer of grated horseradish). The article read as follows:

*'Alleviating rheumatic pain*

*Fresh, coarsely grated horseradish can help to reduce the pain experienced as a result of rheumatism. First* **[Or. 3]** *rub a fatty vegetable oil or lard into the affected areas, before applying a layer of grated horseradish to them and applying pressure. You can leave this layer on for two to five hours before then removing it. Its application has a positive draining effect.'*

The treatment time for the horseradish application stated in the article is incorrect: it should actually read two to five minutes rather than two to five hours. The column was written by a 'herbalist priest', who is a member of a religious order and had taken the name 'Benedikt'. He was an associate of a now deceased 'herbalist priest' and has to date written countless opinion and advice pieces on medicinal herbs which have appeared in print media, radio broadcasts and TV reports. He has so far written two books on medicinal herbs and pens a daily column on medicinal herbs for the defendant's daily newspaper.

The applicant is a subscriber to the 'Kronen-Zeitung' and read the article on 31 December 2016. She placed her trust in the accuracy of the treatment time stated and applied the layer of horseradish as described in that article to the ankle joint of her left foot. She left the dressing on for around three hours and removed

it only once she had already begun to experience severe pain. The strong mustard oils contained in the horseradish had caused a toxic contact reaction.

## 2. Legal provisions:

The request for a preliminary ruling concerns the interpretation of Article 2 in conjunction with Article 1 and Article 6 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the **[Or. 4]** Member States concerning liability for defective products (OJ 1985 L 210, p. 29).

Directive 85/374/EEC was transposed in Austria by means of the Produkthaftungsgesetz (Law on product liability), BGBl No 99/1988, as last amended by BGBl I No 98/2001. The relevant provisions of the Law on product liability read as follows:

'Paragraph 1.(1) If as a result of the defect in a product a person is killed or suffers personal injury or health damage or a physical object separate from the product is damaged, the following persons shall be liable for damages:

1. the undertaking which manufactured the product and put it into circulation;

…'

'Paragraph 3. "Producer" (for the purposes of Paragraph 1(1)(1)) means the person who manufactured the finished product, a raw material or a component part as well as any person who, by putting his name, trade mark or other distinguishing feature on the product, presents himself as its producer.'

'Paragraph 4. "Product" means any movable, physical object, even where incorporated into another movable object or connected to an immovable object, including energy.'

'Paragraph 5. (1) A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, in particular in the light of

1. the presentation of the product;

2. the use to which it could reasonably be expected that the product would be put;

3. the time when the product was put into circulation. **[Or. 5]**

…'

## 3. Forms of order sought and arguments of the parties:

The applicant seeks — in so far as is relevant to the appeal on a point of law — damages of EUR 4 400 … from the defendant and a declaration that the defendant is liable for all adverse 'current and' future consequences resulting from the incident of 31 December 2016. She is a subscriber to the 'Kronen-Zeitung'. The instructions contained in the article by 'Herbalist Priest Benedikt' contained a typographical error by the defendant, as a result of which an excessively long treatment time was recommended. She relied on the information provided by the defendant concerning the treatment time and applied the treatment accordingly, as a result of which she sustained serious injuries. She is seeking, inter alia, damages for pain and suffering (EUR 4 400). Permanent consequences and further delayed effects cannot be ruled out, hence her interest in obtaining the declaration requested.

The defendant argues that it is the proprietor of the 'Kronen-Zeitung'. 'Herbalist Priest Benedikt' is neither an institution belonging to it nor its representative. He is a member of a monastery and an external and recognised expert in the field of herbal medicine. It has thus far always been able to rely on his expertise and it has no knowledge of any similar "damage claims". The column contained advice provided free of charge for its readers without any intention or expectation of gain. Its regional edition is a tabloid newspaper and a commitment to the accuracy of the article cannot be assumed. The injuries sustained and their after-effects are contested.

In so far as is relevant to the appeal on a point of law, the court of first instance dismissed the claim for **[Or. 6]** EUR 4 400 … and the application for a declaration. It found that the defendant had arranged for the article to be written by an expert in the field of herbal medicine who has already published several books and countless opinion and advice pieces in various media on that subject. If the incorrect treatment time has already been stated by him, it had no reason to check the written texts submitted or the articles. Since the author of the article is an expert in the field of herbal medicine, he can be regarded neither as a habitually unfit nor a deliberately dangerous person within the meaning of Paragraph 1315 of the Austrian Allgemeines bürgerliches Gesetzbuch (General Civil Code). If the article provided by the original author was correct but a typographical or transcription error was subsequently made whilst it is in the defendant's hands, a publisher is liable only where it has offered an assurance as to the accuracy of the content of its publication. The court is aware that the print material published by the defendant is a tabloid newspaper. In that newspaper, information is presented in rather short articles in an entertaining fashion and/or a simple and easily understandable manner, and not as pages of scientific discourse. The reader's expectations also differ accordingly in comparison with its expectations of a scientific article, specialist journal or non-fiction book. Equally, a commitment to the accuracy of the article's content cannot therefore be assumed. As a result, the defendant is not liable for the incorrect treatment time stated in the article.

The court of appeal dismissed the applicant's appeal. As a matter of law, it stated that, in the proceedings at first instance on the defendant's 'product liability' **[Or. 7]** as a 'producer', the applicant referred exclusively to fault-based liability, such that 'it was entirely unclear to either the defendant or the court of first instance that, as the producer, the defendant is also to be regarded as bearing strict liability under the Law on product liability'. The applicant's argument regarding the defendant's liability under the Law on product liability put forward in the appeal proceedings constitutes an infringement of the prohibition on the submission of new pleas in law. Furthermore, it cannot be deduced from the applicant's submissions on appeal that the assessment of the law conducted by the court of first instance was inaccurate.

The appeal on a point of law brought by the applicant, by which the latter requests that the form of order sought by it is granted, is directed against the judgment of the court of appeal; in the alternative, it requests that that judgment be set aside.

The Supreme Court orders that the appeal proceedings be stayed and a question of EU law relevant to the resolution of the case be referred to the European Court of Justice.

## 4. Grounds for the question referred for a preliminary ruling:

**4.1.** It is impossible for this court to agree with the court of appeal (or with the defendant) that the applicant failed to put forward sufficient factual claims concerning the defendant's liability under the Law on product liability in the proceedings at first instance. In the first-instance proceedings, the applicant submitted that she is a subscriber to the defendant's print medium and suffered serious injuries as a result of following an erroneous course of treatment recommended therein. In addition, the product (the regional edition of the 'Kronen-Zeitung'), the media proprietor and publisher (the defendant) who published the article, manufactured the product and put it into circulation, and the physical **[Or. 8]** impairment suffered by the applicant (the toxic contact reaction) are all evident from the findings of the court of first instance. All the requirements for examining strict liability under the Law on product liability are therefore satisfied, even if in the first-instance proceedings the applicant based its arguments specifically on the fault-based liability of the defendant. Contrary to the position adopted by the court of appeal, there is in any event no infringement of the prohibition on the submission of new pleas in law under Paragraph 482 of the Zivilprozessordnung (Code of Civil Procedure) if the applicant relied primarily in the appeal proceedings on the liability of the defendant as a producer under the Law on product liability.

**4.2.** When interpreting the Law on product liability, and in particular Paragraph 4 thereof, the requirement to interpret legislation in line with the relevant directive applies … The question as to whether a publisher or media proprietor of a daily newspaper who arranged for an article to be published is liable under Directive

85/374/EEC (and under the Law on product liability) for the inaccurate content of the newspaper is a matter of dispute.

Under the first sentence of Article 2 of Directive 85/374/EEC, for the purpose of that directive 'product' means all movables, even though incorporated into another movable or into an immovable. Pursuant to Paragraph 4 of the Law on product liability, a product is any movable, physical object, even where incorporated into another movable object or connected to an immovable object, including energy.

One body of (German-language) legal literature limits liability for information media to damage caused by the physical item itself (e.g. the poisonous binding **[Or. 9]** of a book or poisonous ink). Others consider product liability to exist even where the defect lies in an intellectual product. The publisher, author and printing company are potentially liable:

The prevalent view amongst the relevant public is put forward as an argument in support of the liability of a (book) manufacturer, media proprietor or publisher, including for the content of the work. After all, a printed work is purchased not as a (more or less elegant, bound) pile of paper but rather because of its content, and consumers' expectations of the product are not just that there are no staples protruding from the printed work on which they could injure themselves but rather that the product imparts the advertised content. In particular, handbooks, manuals, hiking maps etc. can be sold only because the end customers expect to obtain specific instructions from them. If a recipe in a book or a newspaper states an incorrect amount of a particular ingredient which injurious to health, it would inconsistent for the person so harmed to be left empty-handed whereas, if that same excessive quantity had been added mistakenly to a ready-made product purchased by him or were added on account of incorrect instructions for use enclosed with that product, that person could sue the product's manufacturer … **[Or. 10]**

The following arguments are put forward against liability for incorrect information:

- the protective purpose of product liability, in accordance with which liability attaches to the danger posed by the object and not the advice given …;

- the fact that intellectual products are not products within the meaning of Paragraph 4 of the Law on product liability (Article 2 of Directive 85/374/EEC) because they are not physical objects as such …;

- the connection made between product liability and the tangible form of the information is arbitrary and information must be excluded from the scope of Directive 85/374/EEC …; and

- the ‘concern about the unlimited nature’ of such a broad understanding of a product, which would ultimately make any intellectual content committed to writing subject to strict liability …

Since a clear and unequivocal answer cannot be given to the question whether the content of a daily newspaper can be regarded as a product on the basis of the wording of Article 2 of Directive 85/374/EEC, the interpretation of which is in turn decisive as regards Paragraph 4 of the Law on product liability, clarification of that question of law must be sought from the Court of Justice of the European Union.

**4.3.** If the defendant, the publisher and proprietor of the daily newspaper, were to incur strict **[Or. 11]** liability for the content of its newspaper as a producer in accordance with Directive 85/374/EEC, it would, in the view of the referring Chamber, be responsible in principle for the incorrect recommendation concerning the application time for the layer of horseradish (two to five hours rather than the correct period of two to five minutes) which resulted in the physical injury suffered by its reader (applicant). The layout and content of the ‘herbalist priest’s’ column, entitled ‘achieving pain-free relief’, in the editorial section of the newspaper suggested to readers, and therefore to the applicant, that, if used as recommended, applying a layer of grated horseradish for a particular period of time could safely alleviate rheumatic pain. If applying it were to prove injurious to health, the level of safety that may be expected under Article 6(1) of Directive 85/374/EEC would not be satisfied. If it were to be classified as a producer within the meaning of Article 1 of the Directive (Paragraph 1(1)(1) of the Law on product liability) of a defective product (Article 2 of the Directive/Paragraph 4 of the Law on product liability), the defendant would be responsible for the physical harm suffered by the applicant regardless of whether the incorrect treatment time was stated in the written text submitted by the ‘herbalist priest’ or included only as a result of a transcription error on the part of the defendant.

**5.** … [staying of proceedings]

…

Vienna, 21 January 2020

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[comments]